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# Vendor and Purchaser-Demand for Performance

VENDOR AND PURCHASER—DEMAND FOR PERFORMANCE.—Appellant's assignor contracted to sell a Florida lot to appellee for $3,600 and to deliver a deed when one-fourth of the purchase price had been paid. Appellee made the requisite payment September 28 1925, but neither received nor demanded a deed. Thereafter, appellee executed and returned to the vendor six promissory notes and a mortgage. On March 26, 1926, appellee paid the first note, still neither demanding nor receiving a deed. When the second note matured, September, 1926, appellee refused to pay it on the ground that the vendor had breached his contract by failing to deliver a deed when one-fourth of the purchase price was paid. Though demands were made upon him as the other notes matured, appellee made no further payments. On March 29, 1927, the vendor wrote that it had been advised appellee had never received a deed and that it had had one placed on record for him. Vendor assigned the five unpaid notes to appellant after maturity. Appellant sues thereon. Held, purchaser not relieved from liability on purchase-money notes on ground of vendor's breach of contract by failure to deliver deed at time stipulated or reasonably soon thereafter, in absence of notice by purchaser to convey or demand for conveyance and refusal by vendor to convey.[1]

The answer to the question as to when demand for performance of a contract is necessary in order to put the other party in default, varies with the several possible variations in the provisions of the contract. Time may have been made of the essence of the contract. Time as the essence may have been waived by the party entitled to performance. A reasonable time may have been allowed. Again, one party may have acquiesced in the other party's delay. The contract may not have fixed any time for performance.

When time has been made of the essence of a contract and there has been no waiver of that condition by the party entitled to its performance, no demand is necessary in order to put the other party in default when he has allowed the time to go by without performing.[2]

But when time has not been made of the essence or when no time has been fixed at all, in which cases a reasonable time is allowed for performance, a demand appears to be necessary.[3] This position would seem to be supported

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9 Contracts Restatement, Sec. 20; Sec. 29.

1 Allah Farms, Inc. v. Horner (1936), — Ind. App. —, 200 N. E. 740.

2 Richard v. Reeves (1898), 149 Ind. 427, 49 N. E. 348; Frazee v. McChord (1848), 1 Ind. 224; Boldt v. Early (1904), 33 Ind. App. 434; Wheeler v. Garsia (1867), 28 N. Y. Super. Ct. (5 Rob.) 280; Negus v. Simpson (1868), 99 Mass. 388; 13 C. J. 660; Gray v. Robertson (1898), 174 Ill. 242, 51 N. E. 248.

3 Sheets v. Andrews (1829), 2 Blackf 274; Mather v. Scoles (1870), 35 Ind. 1; Sapinsky v. Jefferson County Construction Company (1923), 79 Ind. App. 557, 131 N. E. 846; Goodman v. Gordon (1882), 87 Ind. 126; Frazee v. McChord (1848), 1 Ind. 224; Worley v. Mourning (1808), 4 Ky. (1 Bibb.) 254; Adkins v. Ferrell (1897), 19 Ky. Law Rep. 1082, 42 S. W. 1145; Weller v. Tuthill (1876), 66 N. Y. 347; Myers v. DeMier (1873), 52 N. Y. 647; Northup v. Scott (1914), 148 N. Y. S. 846, 85 Misc. Rep. 515; McNamara v. Pengilly (1894), 58 Minn. 353, 59 N. W. 1055; Walters v. Miller (1860), 10 Iowa 427; Gammon v. Bunnell (1900), 22 Utah 421, 64 P. 958; Fuller v. Hub-

by a good policy. What constitutes a reasonable time varies so greatly with the circumstances of each case as to make it practically impossible for the courts to arrive at any reliable consistency in their decisions. Certainly, in this state of affairs, the parties could not determine for themselves what rights the mere lapse of time had given or taken from them. Inasmuch as the primary object of demand is to enable one party to perform his obligation or otherwise discharge his liability without being subjected to the inconvenience and expense of litigation,[4] the requirement recommends itself as a desirable one. The most obvious opposition to the policy of requiring a demand will arise at the instance of a party who has made a bad bargain and who seeks to take advantage of a lapse of time to relieve himself therefrom. But courts have long recognized the policy of giving a party to a contract the benefit or detriment of his bargain when no element of legal unfairness attended the making of the contract.[5]

When a provision in regard to time has been waived, it would seem, in logic and on the authority of a well-reasoned case, to make no difference whether or not time had originally been made of the essence of the contract;[6] for, when time as the essence has been removed, a reasonable time is then allowed for performance. A demand is accordingly required to bring about a default.[7]

The instant case is one in which time evidently was not of the essence of the contract and in which the appellee has acquiesced in the delay to deliver a deed by continuing to make payments beyond the time when he was entitled to demand delivery of the deed as a condition precedent to such further performance on his own part.[8] Thus, this case falls within the last classification

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bard (1826), 6 Cowen 13, 16 Am. Dec. 423, Kime v. Kime (1866), 41 Ill. 397; Tisdale v. Bryant (1892), 38 Cal. App. 750, 177 P 510; Caner v. Owners' Realty Company (1917), 33 Cal. App. 479, 165 P 727, 13 C. J. 660.

[4] 1 C. J. 979.

[5] Forest Preserve, District of Cook County v. Emerson (1930), 341 Ill. 422, 173 N. E. 477, Keogh v. Peck (1925), 316 Ill. 318, 147 N. E. 266, Stauch v. Daniels (1927), 240 Mich. 295, 215 N. W 311, Kerwin Machine Company v. Baker (1917), 199 Mich. 122, 165 N. W 625, Wheat v. Thomas (1930), 209 Cal. 306, 287 P 102; Eakin v. Wycoff (1925), 118 Kan. 167, 234 P 63, Burge v. Gough (1911), 153 Iowa 183, 133 N. W 340; Ann. Cas. 1912C, 556-562; 25 R. C. L. 225.

[6] Taylor v. Goelet (1913), 208 N. Y. 253, 101 N. E. 867

[7] Axtel v. Chase (1881), 77 Ind. 74, Baker v. Eades (1930), 90 Ind. App. 664, 169 N. E. 686; Taylor v. Goelet (1913), 208 N. Y. 253, 101 N. E. 867; Northup v. Scott (1914), 148 N. Y. S. 846, 85 Misc. Rep. 515; Beechwood Gun Club, Inc. v. City of Beacon (1933), 275 N. Y. S. 249, 153 Misc. 358; Houston Bros. v. Dickson Planing Mill Company (1929), 159 Tenn. 10, 15 S. W. (2d) 749; Lamborn & Company v. Green & Green (1924), 150 Tenn. 38, 262 S. W 467, recognizing also the rule that demand is unnecessary when one party unequivocally refuses to perform; Opejon v. Engebo (1913), 73 Wash. 324, 131 P 1146, Karr v. McAvoy (1933), — Wash. —, 28 P (2d) 118; Bay Minette Land Company v. Stapleton (1932), — Ala. —, 139 So. 342; Lowy v. Rosengrant (1916), 196 Ala. 337, 71 So. 439; General Motors Acceptance Corporation v. Hicks (1934), — Ark. —, 70 S. W (2d) 509; Boone v. Templeman (1910), 158 Cal. 290, 110 P 947, Black, Rescission and Cancellation, (2d Ed.), § 219; 4 A. L. R. 815.

[8] Lowy v. Rosengrant (1916), 196 Ala. 337, 71 So. 439; Axtel v. Chase (1881), 77 Ind. 74, Columbia Airways v. Stevens (1932), 80 Utah 215, 14 P (2d) 984, Lawson v. Hogan (1883), 93 N. Y. 39.

and a demand was necessary in order to put the vendor in default.[9] No demand having been made upon him the vendor was not in default at the time he delivered, or at least tendered, the deed to appellee.

The cases on this subject have generally arisen in a different procedure from the instant case, the plaintiff being the party who failed to establish a default by making a demand for performance. Thus, the courts have often employed language to the effect that a demand is necessary "before an action can be brought." However, inasmuch as the objective in this type of case is to determine whether or not there has been a default in performance, it would seem to be incumbent upon the party asserting nonperformance to establish the default of the other, whether that assertion be made in an affirmative capacity or as a defense to an action brought against him.[10]

The decision of the appellate court in holding the appellee bound to make a demand for delivery of the deed seems in this respect supportable. R. H. N.

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## BOOK REVIEW

RESTATEMENT OF THE LAW OF PROPERTY, American Law Institute Publishers, St. Paul, Minn.

These two volumes represent the initial effort toward the publication in book form of the Restatement of the Law of Property by the American Law Institute. From the Introduction-Division I—one learns that three more volumes are to be published in this Restatment.

Volume I, entitled "Introduction and Freehold Estates," covers definitions of general terms and terms relating to estates in chapters 1 and 2, and the creation of and general characteristics of estates in chapters 3, 4, 5 and 6.

Volume II, entitled "Future Interests—Parts 1 and 2," covers the definitions, creation and characteristics of Future Interests, this work to be completed in the future in Volume III.

These two volumes follow the usual style of the Restatements heretofore published by the Institute. The principle of law or the text is in bold type and under each statement of text is accompanying comment, followed by examples.

The stark precision of the language of the text does not make easy reading, but leaves little room for ambiguity as a more liquid prose might do; however, without any critical petulance, it might be wished that the text could have been edited by a Holmes or a Cardozo. While the criticism to follow is pertinent to all Restatements of the Institute, this writer sincerely believes it is regrettable that there is so little explanation of the reasoning and of the authority on which the presumably restated text is based.

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[9] See note (7), supra.

[10] Northup v. Scott (1914), 148 N. Y. S. 846, 85 Misc. Rep. 515: "Where the time for performance of a contract is not fixed * * * it is presumed the parties intended a reasonable time * * * In such case it would be incumbent on either party desirous of preserving any legal remedy or availing himself of a defense at law for a breach of the contract, to put the other party in default by tendering performance on his part and demanding performance by the other party within a reasonable time specified."